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No. 91-1061

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

RONNIE CURTIS, LANCE CORPORAL
UNITED STATES MARINE CORPS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Military Appeals

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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STATUTE INVOLVED

Uniform Code of Military Justice art. 866, § 10 U.S.C. 866(c). Review by Court of Military Review

> (c) In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part or amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

ARGUMENT

The response in opposition only highlights the present significant controversy regarding the technical operation of the holding of *Batson v. Kentucky*, 476 U.S. 79 (1986).

First, the United States asserts that "*Batson* requires only that a prosecutor give a race-neutral reason for excusing a potential juror, even if the reason would apply in every case and would have no bearing on the issues to be tried in the particular case at hand." Brief in Opposition at 5. This position is in conflict with *Batson*'s holding that "[t]he prosecutor therefore must articulate a neutral explanation related to the particular case to be tried." 476 U.S. at 98.[1] The present case squarely presents the Court with the important issue of whether *Batson* requires only a race-neutral reason for excusing a potential juror or specifically requires a nexus between the proffered reason for the challenge and the case to be tried.

Second, the United States maintains that the "relate[d] to the particular case" requirement represents "petitioner's words." Brief in Opposition at 5. In actuality, those words are attributable to this Honorable Court's *Batson* opinion. 476 U.S. at 98. Moreover, the significance of what the Court said in *Batson* is reaffirmed by what it did in *Hernandez v. New York*, 500 U.S. ——, 111 S. Ct. 1859 (1991): the Court related the proffered neutral explanation (jurors' Spanish language ability) to the particular case to be tried (prosecutor's doubt as to jurors' ability to defer to the official translation of Spanish-language testimony and such evidence would be offered). 111 S. Ct. at 1867 (plurality opinion). Petitioner is not alone in focusing on this aspect of the *Batson* holding, for both federal and state cases have cited the "related to the case" requirement. *See, e.g., United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991); *Jones v. Jones*, 938 F.2d 838 (8th Cir. 1991); *United States v.*

[1] The petition citation to 476 U.S. at 97 was in error. Pet. 12-13.

Murchu, 926 F.2d 50 (1st Cir.), *cert. denied*, 112 S. Ct. 99 (1991); *State v. Green*, 409 S.E.2d 785 (S.C. 1991), *cert. filed*, —— U.S.L.W. —— (U.S. Jan. 29, 1992) (No. 92-——);[2] *State v. Boston*, 94 Ariz. Adv. Rep. 56 (Ariz. Ct. App. Sept. 5, 1991);[3] *State v. Sloan*, 809 S.W.2d 234 (Tex. Ct. App. 1988), *petition for discretionary review dismissed* (Tex. Crim. App. 1991) (en banc), *cert. denied*, 112 S. Ct. 669 (1991). The United States' position in the Brief in Opposition reflects one argument in the ongoing debate concerning the import of *Batson*'s "related to the particular case" requirement; by taking this position, the United States demonstrates the need for the Court's immediate resolution of this controversy.

Third, the United States asserts that petitioner's claim of a conflict between the decision below and *United States v. Clemons*, 941 F.2d 321 (5th Cir. 1991) is mistaken. Brief in Opposition at 5-6 n.2. Petitioner respectfully submits that the Fifth Circuit's explicit requirement that the prosecutor's explanation of the peremptory challenge "must be a race-neutral explanation related to the particular case to be tried," 941 F.2d at 323, is in conflict with the opinion below and the position of the United States in its Brief in Opposition. Petitioner invited the Court's attention to *Clemons* to identify the conflict in the technical application of *Batson* in post-*Hernandez* decisions that resolved issues favorably to the government. Petition at 16. It is this significant difference in legal analysis, and not the mere result of the opinions, that presents the conflict between the lower court and the Fifth Circuit.

Fourth, the question presented is not a fact-bound claim but instead a legal issue concerning *Batson*'s tech-

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[2] This petition is yet another example of the continuing controversy surrounding the technical operation of the "related to the particular case" holding of *Batson*. Petitioner requests the Court to consider these petitions together.

[3] *But see State v. Batista*, No. 2 CA-CR 91-0367, 1992 WL 10649, at *3 (Ariz. App. Jan. 23, 1992).

nical operation. Ironically, as a result of the trial judge's failure to require that the prosecutor's explanation be related to the case, there are no facts to support the lower court's resolution of the *Batson* issue. Faced with the absence of a justification for the peremptory challenge which is related to the case, the United States engages in conjecture and speculation as to the prosecutor's motives. The United States argues a prosecutor "could reasonably believe" that Staff Sergeant Edwards was not aware of the serious responsibilities of deciding a capital case and was not capable of carrying out those responsibilities.[4] Brief in Opposition at 5. A critical error in this case is that the prosecutor never articulated this reason that the lower courts and the Brief in Opposition proffer to support the challenge.

Finally, on February 26 the Court will hear oral argument in *Georgia v. McCollum*, *cert. granted*, 112 S. Ct. 370 (1991) (whether racial discrimination by a defendant in exercising his peremptory strikes is barred by the Equal Protection Clause of the Fourteenth Amendment). As the Court further defines the *Batson* holding's scope, concern for judicial economy and orderly administration of justice supports the Court's immediate and explicit resolution of the "related to the particular case" requirement. Petitioner's case is an appropriate vehicle for resolution of this important issue. Unfortunately, the Brief in Opposition misstates the current posture of the case by asserting that "the Court of Military Appeals upheld petitioner's convictions, but remanded the case to the court of military review for further proceedings on his sentence." Brief in Opposition at 2. In fact, the Court of Military Appeals set aside the Court of Military Review's 1989 decision and remanded the case with the

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[4] The record belies any conclusion that Staff Sergeant Edwards did not appreciate the seriousness of the case. He immediately responded to a question agreeing the trial was one of the more serious responsibilities in his whole life. (Tr. 258).

specific charge to determine whether prejudicial error occurred as to the "findings or sentence." Petition at App. 19b. The remand makes this case particularly appropriate to resolve the question presented. The Court of Military Review possesses fact-finding power;[5] its statutory mandate gives it an "awesome, plenary, *de novo* power of review." *United States v. Cole*, 31 M.J. 270, 272 (C.M.A. 1990). Should the Court resolve the question presented in petitioner's favor, the Court of Military Review, as it addresses other remanded issues, can conduct fact-finding proceedings at which the prosecutor can explain his motives for the peremptory strike. *See, e.g., Batson*, 476 U.S. at 100; *Powers v. Ohio*, 500 U.S. ——, 111 S. Ct. 1364, 1374 (1991). As this case presents an important systemic issue and judicial economy points to immediate resolution of the question presented, the petition should be granted.

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[5] Uniform Code of Military Justice art. 66(c); 10 U.S.C. § 866(c) (1982).

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the writ should be granted.

Respectfully submitted,

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